SUPREME COURT, U. S.

No. [redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

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JOSEPH SPATUZZA and **JAMES COZZO**,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GEORGE F. CALLAGHAN
105 West Adams Street
Chicago, Illinois 60603

MAURICE J. WALSH
105 West Adams Street
Chicago, Illinois 60603
Attorneys for Petitioners.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LA review 5-6581

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Joseph Spatuzza and James Cozzo, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENTS AND OPINION OF THE COURT BELOW.

On April 24, 1964, the United States Court of Appeals for the Seventh Circuit affirmed the judgments of conviction entered in the United States District Court for the Northern District of Illinois, sentencing defendant Spatuzza to four years of imprisonment, and the defendant Cozzo to two years of imprisonment. The Court of Appeals opinion as yet has not been reported. It is printed herewith as Appendix "A".

JURISDICTIONAL STATEMENT.

On a jury trial the defendants were convicted on the charges of a single count indictment alleging that the defendants did buy, receive and unlawfully possess stolen goods in violation of Section 659, Title 18, U. S. Code.

The judgments were affirmed on April 24, 1964; and a timely petition for rehearing was denied on May 21, 1964. (Appendix "B",.

The jurisdiction of this Court is invoked under the provisions of Section 1254(1) of Title 28, U. S. Code.

QUESTIONS PRESENTED.

I.

Has guilt been found by a jury according to the procedure and standards appropriate for criminal trials in Federal Court where:

A. While testifying as a prosecution witness an agent of the F.B.I. injected into the trial the statement that the photograph of a defendant "is available along with many other photographs of known cartage thieves that we keep";

B. The question asked did not call for the answer made;

C. The trial was for an offense involving a cartage theft;

D. Cross examination of the witness to show that the defendant was not "a known cartage thief", and to undo the harm was disallowed.

II.

Can a conviction and sentence stand upon equivocal instructions to the jury when it appears:

A. The statute upon which the case was prosecuted was never read or explained to the jury, and the essential elements of the offense were erroneously stated in the charge;

B. The essential element of "value" was never submitted to the jury for decision although "value" is determinative of the grade of the offense, under the statute, *i.e.* felony or misdemeanor;

C. The sentence imposed was for the felony;

D. The jury was not instructed that the government was required to prove that the theft was from one of the places specifically enumerated in the statute;

E. The trial Court instructed the jury "a witness is presumed to speak the truth", but refused a tendered instruction of the defendants by which the jury could reject the testimony of witnesses found to have sworn falsely?

III.

Is there not a fatal variance or failure of proof affecting the substantial rights of the defendants where the indictment charges a theft from specifically described premises and the proof shows the premises were not those described?

IV.

Were the constitutional rights of the respective defendants to the assistance of counsel and due process destroyed by an unreasonable limitation of final argument to twenty minutes per defendant where:

A. The evidence of fourteen witnesses and stipulations of the testimony of three others was involved and over 600 pages of testimony were taken; and

B. The defendants offered no evidence and relied upon the failure of the prosecution to meet its burden of proof; and

C. The Court instructed the jury that "a witness is presumed to speak the truth", but refused to give a request by the defendants that the jury was authorized to reject the testimony of witnesses found to have sworn falsely, except where corroborated by other credible evidence.

STATUTES INVOLVED.

Section 659, Title 18, United States Code, so far as pertinent, provides as follows:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, plat-

form or depot or from any steamboat, vessel, or wharf, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * * *

"Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

STATEMENT OF THE CASE.

Petitioners Spatuzza and Cozzo were indicted in one count with Richard Bravieri and Anthony La Pore in which it was charged they did buy, receive, and unlawfully possess stolen goods of a value in excess of $100.00 which had been stolen from a depot of the New York Central System at Chicago while in transit from Hillside, New Jersey to Chicago, Illinois (A. 9).

Bravieri pled guilty before trial. Spatuzza, Cozzo and La Pore were tried by jury and found guilty. La Pore did not appeal.

The errors relied on below related to: prejudice created against the defendants by an inflammatory statement made by an F.B.I. agent; restriction of cross examination of this agent and other government witnesses; evidence as to other offenses; to erroneous instructions to the jury and the failure to give essential instructions; failure to prove the charge in the indictment and the elements of the offense; an undue restriction on time allowed for final arguments of defense counsel; failure to grant separate trials on motion and when prejudice therefrom appeared during trial; and failure to require the government to comply with Section 3500, Title 18, in regard to former statements of witnesses.

THE EVIDENCE

On December 20, 1962, various cosmetics were shipped from Bristol-Meyers Company in Hillside, New Jersey to Bristol-Meyers Company in Chicago. The shipment was by piggy-back, the van containing the goods being loaded onto a car of the New York Central Railroad. The van was received in the yard of N.Y.C. Transport Company on December 24, 1962.

N.Y.C. Transport Company maintains this facility for the unloading and loading of vans onto railroad cars. The Transport Company is a separate entity from the New York Central Railroad; has its own employees (A. 16-17) and rents the space for its yard (A. 18); its employees are not railroad employees (A. 22, 23).

On December 26, 1962, a driver for N.Y.C. Transport Company took the van from that company's yard to the warehouse of Cosmetics Distributors to which it was consigned and the warehouse refused to accept delivery (A. 28). The driver returned the van to the Transport Company yard. On December 27th the van was missing from the yard.

THE EVIDENCE AS TO PETITIONERS.

On January 14, 1963, several cars each manned by two F.B.I. agents had the garage at 1302 West Erie Street under observation.

Two of these agents, Grundler (A. 74-79), and Malone (A. 93-96), gave evidence that Spatuzza had been in the garage and assisted in the removal of some boards from the garage from which the stolen van subsequently was driven. He was arrested as he drove the Ford some distance behind the trailer which was being driven by Bravieri.

As to the petitioner Cozzo, the evidence is quite different and he complained below that the trial Court erred in denying his motions for acquittal. He was first said to be in the vicinity where Spatuzza, La Pore and Bravieri were apprehended and the trailer load of cosmetics was recovered, by FBI Agent Vernon E. Daniels. Daniels said he saw a man turn south on the west sidewalk of Elizabeth Street while Daniels was engaged in surveillance of the garage from which the trailer load of cosmetics had

emerged and proceeded east on Erie Street. Daniels left his automobile apparently for the purpose of apprehending this man, but the man ran west in the alley south of Erie Street, turned into a gangway and had disappeared by the time Daniels arrived at the alley gate. Daniels did not identify the man at that time, and did not know who the man was (A. 58, 59). Daniels had seen a photograph of Cozzo prior to that time when it was displayed to him by Agent Grundler, and he had heard Cozzo's name as a "possible suspect" (A. 61). Sometime after his return to the Bureau office, he again examined the picture of Cozzo and others and decided that the man who had disappeared in the gangway was Cozzo. Agent Daniels saw no activity or participation by Cozzo, and did not hear anything said by La Pore (A. 58). Agent Edward Kavanagh who was with Agent Daniels in the Bureau car engaged in the surveillance, did not identify Cozzo. (A. 69).

Agent Grundler of the F.B.I. testified that from 150 to 180 feet east of the garage from which the trailer load of cosmetics emerged, he observed four men and identified three of them as Spatuzza, La Pore and Cozzo. He stated that thereafter La Pore and Cozzo were out on Erie Street apparently directing traffic so that the tractor trailer unit could emerge from the garage into Erie Street. (A. 75-76).

On cross examination Agent Grundler who had displayed a group of photographs, including that of Cozzo, to Agent Daniels and a group of agents engaged in this surveillance and investigation (A. 62), testified that, at the time he saw the two men out on the street directing traffic, they were not identified by him and that at that time he did not know who they were. He said he found out who Mr. La Pore was after Agent Kavanagh made the arrest of

La Pore on the street, and that "Mr. Cozzo I identified from a photograph in our office" (A. 79).

In response to a question by counsel for Cozzo on cross examination "And who gave you the photograph, if anyone?", Grundler stated that the photograph was available with many other photographs "of known cartage thieves that we keep" (A. 79). Motions for mistrial were denied. (A. 79-85).

On further cross examination Agent Grundler testified to employment for twelve years with the F.B.I. and stated he had been a witness more than eight and less than fifteen times. Objection was sustained to the question "Have you received any special training as a witness?" (A. 85). Objection was sustained to a question as to whether it was his view that the people on the pictures that he distributed to his fellow agents would be involved in the affair, and as to whether he expected to see Cozzo, or hoped to see Cozzo at the scene of the investigation and surveillance. Over the government's objection, Agent Grundler said he did not know from his own personal knowledge that Cozzo had ever been convicted of a cartage theft, and a question as to whether he did, in fact, know that there was no record in the FBI files of any conviction for cartage theft on the part of Cozzo, was not answered, when the objection of Mr. Echeles, attorney for defendant La Pore, was sustained (A. 89). Agent Grundler further testified on redirect that he did not see Mr. Cozzo come out of the garage and that his testimony "never placed Mr. Cozzo on the tractor" (A. 92).

Agent Robert L. Malone (A. 93), a Special Agent of the FBI for nine years, stated that on the day in question he and Agent Grundler were in a car about 150 to 180 feet east of the garage from which the trailer later emerged. His evidence was in substance the same as Grundler's. (A. 100).

Special Agent Coughlin testified to witnessing the arrest of the driver of the truck and the arrest of Spatuzza and interrogation of Spatuzza.

Special Agent Billy B. Bennett testified that he took over the investigation from Agent Grundler on January 14, 1963, and took over the custody and control of the trailer and its contents which he described as a New York Central Trailer (A. 110).

It was stipulated that *William J. Berwanger,* if called as a witness, would testify that he received the aforesaid merchandise from Billy B. Bennett and that he inventoried it. It was further stipulated that *Robert Alexander,* if called as a witness, would testify concerning the pricing of the Bristol-Meyers products included in the inventory and that the net value of said merchandise was $37,600.85.

Whereupon the government rested, and the motion of the defendants for acquittal at the close of the government's evidence was denied, and thereafter the defendants rested and their motion for judgment of acquittal at the close of all evidence, was denied (A. 114).

The Court ordered that objections made in conference prior to instructions, would stand as though made subsequent to the instructions and as compliance under Rule 30 of the Federal Rules of Criminal Procedure (A. 137), and the defendants made additional objections to the instructions as given by the Court before the Jury retired. The Jury returned a verdict of guilty as charged as to all defendants, and the Court forthwith and without further argument, denied the motions of all defendants for a judgment of acquittal, for a new trial, and in arrest of judgment (A. 142). The sentence as to Spatuzza to imprisonment for a period of four years, and of Cozzo to two years, appears at pages 166-169 of the Appendix.

REASONS RELIED ON FOR GRANTING THE WRIT.

The Writ of Certiorari here sought should be granted because by cumulative and serious errors which prejudiced the petitioners, they were convicted by a procedure which was contrary to standards appropriate for a criminal trial in the Federal Courts.

The Court of Appeals below decided the appeals in a manner contrary to decisions by the same Court of the Courts of Appeal of other Circuits, and of this Court.

This Court should examine two questions presented under the exercise of its authority and duty to supervise the conduct of criminal trials in the Federal Courts, to-wit: (a) the growing adherence to so-called standard instructions promulgated in different districts; and (b) the appropriate minimum standards for time allowances to counsel for argument to the jury, so that the right to assistance of counsel is not actually destroyed, under a claimed exercise of "discretion."

I.

THE INFLAMMATORY VOLUNTARY STATEMENT BY AN AGENT WITNESS CREATED INCURABLE PREJUDICE AGAINST THE DEFENDANTS AND DENIAL OF MOTIONS FOR MISTRIAL WAS REVERSIBLE ERROR.

The identification of the petitioner Cozzo depends almost entirely on examination of photographs subsequent to the events of January 14, 1963. (Agents Daniels A. 58, 59, 61, 62; Grundler A. 79, 88, 90, 92; Malone A. 100.) Agent Malone's identification came three days later when he was told by his superior that Cozzo was in custody. On view,

he added his identification to that of Daniels and Grundler who reconciled their recollection from the scene with Cozzo's photograph.

Agent Daniels had testified to distribution of photographs to the agents engaged in the investigation and surveillance. (A. 61.)

The photographs were never introduced or offered.

After Daniels testified, Agent Grundler testified to making identification of Cozzo, whom he did not know or recognize when he saw him, from a photograph at "our office" (A. 79.). At this point the following occurred on cross examination by Cozzo's attorney:

> "Q. And who gave you the photograph, *if anyone?* (Emphasis supplied)
>
> A. That photograph is available along with many other photographs of known cartage thieves that we keep and —
>
> Mr. Echeles: If the Court please, I move for a mistrial.
>
> Mr. Callaghan: I join in the motion.
>
> The Court: We will excuse the Jury. Mr. Marshal, will you excuse the jury, please." (A. 79)

The obvious prejudice to Cozzo and to the other defendants requires little or no argument for demonstration. The statement by the veteran Agent Grundler of the Federal Bureau of Investigation, in charge of other agents of nine, eleven, eight, twenty, seven, and twelve years experience, respectively, was not responsive to the limited question, "And who gave you the photograph, *if anyone?*" (Emphasis supplied) The Court of Appeals below held the answer responsive.

Grundler then took this occasion to deliberately volunteer and insert in the record this scandalous, damning, and unjustified statement. He probably acted on past advice that an alert agent witness should hurt the defendants on cross examination. Inquiry as to his training as a witness was cut off *in limine*. (A. 85.) However, it is no secret that this Bureau trains its agents by lecture and practice as witnesses.

The Court denied motions for mistrial based on this denial. (A. 79; 82.) This action was based on a clear misapprehension that prior witnesses had testified that Cozzo's photograph was in "the FBI files". (A. 81, 83.) No witness had so testified, and, of course, no characterization such as "known cartage thieves" had been even hinted at. The evidence to this point did not disclose that the photographs were more than in the custody of the F.B.I.

Motions for severance by all defendants on the now apparent prejudice from joint trial were denied. (A. 82, 84.)

Prejudice to all defendants was plain and incurable. Cozzo was characterized as a known cartage thief, implying convictions and record. This was false, and that allegation was made to the Judge by Cozzo's attorney and remained unchallenged by the prosecutor or the Judge, throughout the proceedings. However, the record was now so infected by this deliberate prejudice that no one could receive a fair trial from the jury that was told that Cozzo was a "known cartage thief" and that pictures of possible suspects were distributed at a briefing.

The decision of the Court below in *United States* v. *Dressler* (C.A. 7) 112 F. 2d 972, governs the situation in this case. The Court of Appeals said, at page 977:

> "It is inconsistent with our traditional conception of a fair trial to permit any information to go to a

jury which might influence the jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged. In harmony with the foregoing, courts have excluded evidence of, or references to, prior offenses of a defendant."

And at page 978:

"The Government urges that this Court must assume that there was no prejudice since the defendant makes no affirmative showing that the jury was influenced adversely to defendant's cause. But the rule followed is not in harmony with the foregoing. In *Little* v. *United States* the following statement of the court makes the governing rule clear: ' * * * where error occurs which, within a range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. * * * The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand.'

"In *Vicksburg & Meridian Railroad Co.* v. *O'Brien*, the Supreme Court expressed the same idea: 'While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party.'

"And the Supreme Court repeated the substance of the foregoing in *McCandless* v. *United States* when it stated that it was a 'well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial'."

Appropriate is the language of Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440 at page 453:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *United States*, 332 U.S. 559, 92 L. ed. 154, 169, 68 S. Ct. 248, all practicing lawyers know to be unmitigated fiction. * * * "

The error relied upon by the defendants under this proposition of law is that in a case such as this, where the issue was close, and the record is replete with efforts on the part of the prosecutor to inject incompetent evidence, even though this evidence was stricken, the cumulative effect of all of this extraneous material going before the jury was such as to deprive the defendants of a fair trial and prejudice them to the extent that upon this record the case should be reversed.

We respectfully ask this Court to apply the principle laid down in the case of *United States* v. *Dressler*, 112 F. 2d 972, at page 977. (quoted above).

In *Bollenbach* v. *United States*, 326 U.S. 607, at page 614, this Court stated:

> " * * * In view of the Government's insistance that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelled out of a record but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in Federal Courts."

II.

THE COURT'S REFUSAL TO PERMIT CROSS EXAMINATION AIMED AT DIMINISHING THE PREJUDICE AND TO PLACE THE AGENT WITNESS IN A PROPER SETTING WITH REGARD TO HIS TRAINING AND RELATIONSHIP WITH THE GOVERNMENT WAS REVERSIBLE ERROR.

Cross examination of Agent Grundler after the events described and complained of under Point I continued. (A. 85.)

The witness said he had been an F.B.I. agent twelve years and a witness more than eight times and less than fifteen. Objection was sustained to the question "Have you received any special training as a witness?" (A. 85.) This was error since the question was calculated to throw light on the attitude of the witness, his manner of testifying, and his relationship to the government. Obviously where there is a practiced and trained witness the defense should be permitted to have this fact called to the jury's attention so it may properly judge the "manner" in which he testifies, "the character of the testimony given", and "witness' motive and state of mind". (See Court's charge to jury (A. 131.))

Further parts of the cross examination of Grundler is set out *in haec verba*. (A. 88, 89.) Questions as to whether the witness expected or hoped to see the defendants or Cozzo went unanswered, when the prosecutor's objections were sustained. These would have disclosed whether his bias had conditioned his mind so that his identification of Cozzo was automatic. The jury was entitled to know his "state of mind" and possible "motive" for being esteemed as a good forecaster of the identity of the persons involved in the matters under investigation. (Court's

Charge A. 131.) The Court told the jury to consider "motive" and "state of mind" but clos the door on inquiry, "*in limine*". *Alford* v. *United States*, 282 U.S. 687, 692, 75 L. Ed. 624.

In the *Alford* case, 282 U.S. 687, 692, this Court said:

> "Counsel often cannot know in advance what pertinent facts may be elected on cross examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general apply. (Citing cases). It is the essence of a fair trial that reasonable latitude be given the cross examiner, even though he is unable to state to the court what facts a reasonable cross examination might develop. Prejudice ensues from denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. (Citing cases). To say that prejudice can be established only by showing that the cross examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. (Citing cases)."
>
> * * *
>
> "The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error." (Citing cases).

In *Heard* v. *United States*, 255 F. 829, the Court said:

> "A full cross examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of his right is a prejudicial and fatal error."

See *Gordon* v. *United States*, 344 U.S. 414, 97 L. Ed. 447.

The Court further, on several occasions, sustained objection to questions concerning the agent witness' training and practice as witnesses. Surely this information would have value to the jury in appraising the witnesses, their demeanor and their "state of mind" and "motive" to excel as government witnesses.

The Court of Appeals below, in *United States* v. *Haupt*, (C.A. 7), 136 F.2d 661, 673, held that it was reversible error to fail to order separate trials or severance of defendants when prejudice became apparent during trial. The Fourth Circuit in *Ingram* v. *United States*, 272 F.2d 567 has also expressed this rule, and Judge Chesnut of the District Court of Maryland in *United States* v. *Decker*, 51 F. Supp. 20, 25, 26, granted a new trial on this principle. The opinion in the case of *De Luna* v. *United States*, (C.A. 5), 308 F.2d 140, 141, shows a reversal where the comment on a defendant's right of silence came only from a co-defendant and prescribed severance as a preventive of the error.

In the case at bar, the attorney for La Pore, fearing an answer that might again volunteer more than was asked for, objected to a question aimed at diminishing the prejudice from Grundler's inflammatory voluntary statement about Cozzo's photograph in the files of known cartage thieves. (A. 89.)

Here we have a case of a co-defendant securing a ruling which denied Cozzo's *right* to cross examination. Obviously a severance was required on the principles of the *De Luna* decision.

The trial Court, in haste to dispose of a case, ignored the substantial prejudice emanating from these events.

III.

THE COURT ERRED BY GIVING ERRONEOUS, INCOMPLETE AND AMBIGUOUS INSTRUCTIONS; AND BY REFUSING PROPER REQUESTS FOR INSTRUCTION.

A.

The petitioners requested that the Statute (Section 659, Title 18), be read to the jury. This was denied (A. 115). Nor were the essential elements of the offense given in the charge.

Had the Statute (Sec. 659 T. 18 U.S.C.) been read to the jury or the essential elements of the offense given in the charge, the jury would have been advised that the government was required to prove beyond a reasonable doubt each of the following:

1. That the property described in the indictment was stolen from the depot of the New York Central System.
2. That at the time it was stolen it was moving as an interstate shipment.
3. That the petitioners possessed said stolen property.
4. That at the time they possessed it they knew it was stolen.
5. That the value of the property exceed $100.00.

None of these essentials were made known to the jury.

The Court gave no instruction as to value and the omission to charge as to value was excepted to. (A. 139). This omission was error. This basic issue not having been submitted to the jury, the verdict will not sustain the judgments imposed on these petitioners. If the value found is

less than $100.00 only a misdemeanor is involved and it is not possible to tell in the state of the record whether the conviction is for a felony or for a misdemeanor. The decision of the Court of Appeals is contrary to:

United States v. *Gordon*, 253 F.2d 177, 180 (C.A. 7); and

Cartwright v. *United States*, 146 F.2d 133 (C.A. 5).

The Court did read the indictment to the jury. Immediately following the reading of the indictment to the jury which concluded with "in violation of Section 659, Title 18, United States Code" (A. 133), the Court advised the jury:

> "That section in question makes it a crime to buy, receive or unlawfully have in your possession goods and chattels stolen from an interstate shipment." (A. 133).

This obviously is error lacking as it does the essential of "Knowing the same to have been stolen." Without this knowledge no crime is committed.

The Court continued, "It is not necessary for the government to prove that the defendants bought, received and had in their possession under the statute in question. It is sufficient if the government establishes that the defendants either bought or received or possessed." (A. 134). Then followed:

> "I will say to you at this time that the evidence presented by the government is not sufficient to establish that these defendants bought or that they received, and you have before you *simply to decide* whether they had in their possession merchandise *which was stolen from interstate shipment* and which they knew to have been stolen from interstate shipment." (Emphasis supplied).

The above instructions are repugnant and in conflict. In the last quoted instruction the jury was told they had simply to decide whether the defendant "had in their possession merchandise which was stolen from *interstate shipment* and which they knew to have been stolen from interstate shipment. This was error.

Again the essentials were omitted.

The decision herein is in conflict with the following cases.

In *United States* v. *Allegrucci*, 258 F.2d 70, 75 (C.A. 3), the Court held:

> "Attention must be directed, too, to the District Court's final instructions that the issues for the jury were as follows:
>
> > 'Was there stealing from interstate commerce? Was there a receiving of stolen goods knowing them to have been stolen?'
>
> "These instructions were given before the jury was sent out, at the end of additional instructions which were given as a result of executions taken to the charge.
>
> "The instruction as put: 'Was there stealing from interstate commerce?' was erroneous.
>
> "As we held in *United States* v. *Manuszak*, 1956, 234 F.2d 423: 'Under this statute (Sec. 659), it is not a federal crime to steal goods from an interstate shipment of freight *unless the goods are taken from one of the specifically enumerated places or facilities* (railroad car * * * or other vehicle * * * *platform* or dept, etc.). *Other thefts, although of goods which are part of an interstate* shipment, are not federal crimes." (Emphasis supplied.)

"Here, the government was required to prove more than a mere 'stealing in interstate commerce', and guilty possession of the stolen merchandise. It was required to prove that the merchandise was stolen from a 'platform' as specified in Section 659.

"Nowhere in its charge did the District Court instruct the jury that the evidence had to establish the theft of the goods from a platform."

In *McFarland* v. *United States,* 174 F.2d 538, 539, (C.A. D.C) the Court said:

"If a charge to a jury, considered in its entirety, correctly states the law, the correctness of one paragraph or one phrase standing alone ordinarily does not constitute reversible error; but it is otherwise if two instructions are in direct conflict and one is clearly prejudicial, for the jury might have followed the erroneous instruction. *Nicola* v. *United States,* 3 Cir., 1934, 72 F.2d 780, 787; *Drossos* v. *United States,* 8 Cir., 1924, 2 F.2d 538, 539. 'A conviction ought not to rest on an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States,* 1946, 326 U.S. 607, 613, 66 S. Ct. 402, 405, 90 L. Ed. 350."

In *Bollenbach* v. *United States,* 326 U.S. 607, 90 L.Ed. 350, this Court stated (613-614):

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue. . . . The government's suggestion really implies that although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the Appellate Court the jury's function of measuring the evidence by appropriate legal yardsticks.

• • •

"In view of the government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is *not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.*

"'Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those "technical errors" which "do not affect the substantial rights of the parties" and must therefore be disregarded. (February 26, 1919.) 40 Stat. 1181, c. 48, 28 USCA Section 391, 8 FCA title 28, section 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished.'" (Emphasis supplied.)

The language of this Court in *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82, applies to this case:

"And, of course, in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

The Court in *United States* v. *Donnelly*, 179 F.2d 227, 233, C.A. 7) stated:

"Where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, since it is impossible to tell which one the jury followed, it constitutes reversible error. *Nicola* v. *United States*, 3 Cir., 72 F.2d 780, 787; *McFarland* v. *United States*, D.C. Cir., 174 F.2d 538, 539. A conviction ought not rest on a equivocal direction to the jury upon a basic issue. *Bollenbach* v. *United States*, 326 U.S. 607, 613, 66 S.Ct. 402, 90 L.Ed. 350."

Nowhere in the charge were the elements of the crime defined.

It is reversible error for the trial Court to fail to define the crime involved in the indictment, and to fail to define the elements of it, to the extent necessary to permit the jury to apply the law to the facts. *Williams* v. *United States*, 1942, 76 U.S. App. D.C. 299, 131 F.2d 21; *Miller* v. *United States*, 10 Cir., 1941, 120 F.2d 968.

In *Morris* v. *United States*, 156 F.2d 525 (C.A. 9), the Court reversed for failure to define the statute involved, saying:

> "In a criminal case, it is always a duty of the court to instruct on all essential questions of law, whether requested or not. See *Screws* v. *United States*, 1945, 325 U.S. 91, 107, 65 S.Ct. 1031, 89 L.Ed. 1495; *Corson* v. *United States*, 9 Cir., 147 F.2d 437; *Kreiner* v. *United States*, 1926, 2 Cir., 11 F.2d 722, certiorari denied 271 U.S. 688, 46 S.Ct. 639, 70 L.Ed. 1152.
>
> "The court did not define the offense of which the appellant was charged and was being tried, and the jury was given no opportunity of applying the facts to the law.
>
> • • •
>
> "Where the instruction or charge of the court is based upon a statute which is sufficiently clear, the judge may set forth the statute in the instruction, otherwise he should explain it in other language in order that the jury may have a clear understanding of the law before *applying it* to the facts. See Sloovere, Functions of the Judge and Jury in the Interpretation of Statutes, 46 H.L.R. 1086. (Emphasis the court's.)
>
> "The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged."

Lott v. *United States*, 218 F.2d 675 (C.A. 5) and *Barry* v. *United States*, 287 F.2d 340 (C.A.D.C.), are apposite here and we request the Court to consider them.

B.

The defendants requested the following instruction which was refused:

> "The Court instructs the jury that if you believe from the evidence that any witness has wilfully and knowingly sworn falsely on this trial to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his or her entire testimony, except insofar, if at all, as it may have been corroborated by other credible evidence, or by facts and circumstances proved on the trial. (Refused.)" (A. 161.)

The trial Court held this was covered by other instructions. (Add'l A. 1).

The error in such refusal is patent upon a reading of given instructions as follows:

> "You as jurors are the sole judges of the credibility of the witnesses and the weight which their testimony deserves. Obviously, since you are the sole judges of the facts, you are the sole judges of the evidence on which those facts will have to be found.
>
> "A witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief." (A. 131).
>
> "Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons witnessing or participating in an incident or transaction may see and hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon human experience. In weighing the effect of a discrepancy,

consider whether it pertains to a matter of importance or unimportant detail, and whether the discrepancy results from innocent error or apparently wilful falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves." (A. 131-132.)

Objection to part of this instruction was made (A. 114).

In this state of the record can it be said that the credibility of witnesses was fairly submitted to the jury? Should not the jury have been given the right to reject the testimony of a witness whom it did not believe?

The vice of this erroneous instruction was discussed in the recent case of *Knapp* v. *United States*, 5 Cir., 316 F.2d 794. Circuit Judge John R. Brown, concurring specially with respect to the court's discussion of the exact charge here given, stated:

> "These charges are not only deficient from a structural standpoint, I think they are positively wrong." (p. 795)

And further (p. 796):

> "Considering the charge as a whole, which the law exacts of appellate courts and theoretically of juries, it lays down the proposition that as a matter of law, and not as a mere matter of inferences or impressions drawn, a witness speaks the truth unless there is 'convincing evidence', to the contrary. . . ."
>
> "Recasting the instructions on the credibility of a witness, the shorthand symbol 'presumed' or 'presumption' would make them read substantially as follows:
>
> > 'The law requires that the jury conclude that a witness speaks the truth. . . .'

"This is more than mere confusion engendered by the loose, inarticulate use of the ambiguous word 'presumption' or 'presumed' which this Court pointed out in *Barfield* v. *United States*, 5 Cir., 1956, 229 F.2d 936 at 939-941. Here 'presumption' becomes a mandate of law.

"Of course once it becomes a mandate, it is positively wrong. This is so because the truth finding function of a jury in determining the credibility of a particular witness is not a matter which can be committed to a verbalized formula by a Judge or a number of Judges or a Court or a number of Courts. Nor is the matter saved by such weasel-phrases such as 'in the absence of convincing evidence to the contrary,' 'until outweighed by evidence to the contrary,' etc.

"What is truth relates to facts, not legal principles. *Who* is telling the truth is not a legal question. *How* the truth is determined is not a legal matter. This is a thing committed to the common sense and good judgment of the jurors based on everyday experiences as human beings in an imperfect society. A moment's reflection will remind even Judges that in the quest for truth in their affairs off the bench, they believe, they disbelieve, they accept, or they reject the statements of their fellow men in countless situations most frequently by intuitive judgment or impression wholely incapable of an articulate elucidation. The genius of the jury system is to transport this common sense into the machinery of the law. If the law undertakes to prescribe categorically either *what* is truth, or *who* is truthful, or *how* one goes about ascertaining *who* or *what* is truthful, the verdict becomes something less than the reflection of this process of good common sense." (Emphasis, the court's.)

It must be remembered that only government witnesses testified in this case. Under the context and setting of this

record, this instruction constituted plain and harmful error.

IV.

THERE WAS A COMPLETE FAILURE TO PROVE THAT THE PROPERTY WAS STOLEN FROM THE "DEPOT" DESCRIBED IN THE INDICTMENT.

It is fundamental that the theft be from one of the places described in Section 659, Title 18, United States Code. It is also basic that the charge must be proved as laid.

The indictment alleges that the goods were stolen from "a depot of the New York Central System" located at Chicago, Illinois. What constitutes the "New York Central System" does not appear in the pleadings or the proofs. That such an entity exists either *de facto* or *de jure* likewise does not appear.

The evidence is that the van, containing the goods in question disappeared from the *yard* of the *New York Central Transport Co.*, on the 27th of December 1962. There is no evidence that this *yard* was a "depot of the New York Central System." Indeed, the proof showed that New York Central Transport Co., is a distinct entity from New York Central Railroad. (A. 17-18). Its employees are not railroad employees. (A. 16, 18, 22, 23).

The testimony of government witnesses makes it clear that "the yard of New York Central Transport Co.", cannot by any reasoning be deemed to be a "depot of New York Central System"—(Sorenson A. 14-23, Farr A. 28-36, De Cola A. 39-41).

The decision of the Court below is in conflict with the following cases.

In *Cartwright* v. *United States* (C.A. 5), 146 F. 2d 133, 135, the defendant was convicted for stealing "property of the United States". The proof established that the property taken was property of the Defense Plant Corporation. In reversing the conviction, the Court stated:

> "While, therefore, the proof shows that an offense has been committed within the purview of Sec. 82, that is a taking of property of a corporation in which the United States is a stockholder, it shows also that that offense was not the offense charged in the first count, 'taking property of the United States'. The government's position that this is a mere technicality since the United States beneficially owned the stock of the corporation, and, therefore, must be considered to be the owner of its property, will not at all do. The indictment statute recognizes, as the law generally does, the distinction between a corporation and the owners of its stock. The government, having chosen to allege that the property stolen was the property of the United States, did not discharge its burden of proof by showing, as it did here, that it was not such property, but that, on the contrary, it belonged to the Defense Plant Corporation."

In *United States* v. *Tuffanelli* (C.A. 7), 131 F. 2d 890, the indictment fixed the place where an alleged business was carried on but failed to prove the allegation. This Court said, at page 892:

> "Where an indictment specifically describes the premises on which the crime is alleged to have been committed, the description becomes a matter of substance and must be proved as alleged. *Heitman* v. *United States*, 9 Cir., 5 F. 2d 887; *Naftzger* v. *United States*, 8 Cir., 200 F. 494; *Inderson* v. *United States*, 5 Cir., 30 F. 2d 485; and *Todd* v. *United States*, 5 Cir., 48 F. 2d 530."

V.

THE CONSTITUTIONAL RIGHT OF THE RESPECTIVE DEFENDANTS TO ASSISTANCE OF COUNSEL WAS IMPINGED ON AND SUBSTANTIALLY DESTROYED BY UNREASONABLE LIMITATION OF EACH DEFENDANT'S FINAL ARGUMENT TO TWENTY MINUTES.

The Court below did not decide this question, although it was presented.

The evidence of fourteen live witnesses and 3 stipulated witnesses was involved. Five F.B.I. agents testified at length on direct and cross examination as to their activities and the observation of the defendants. Eight witnesses testified to the shipment, its interstate character, the loss of the trailer and its contents, the recovery thereof, and identified numerous way-bills, freight bills, and other documents connected with the shipment. Over 600 pages of testimony were taken.

The government requested forty minutes for its opening argument and twenty minutes for rebuttal and urged this time was necessary in order to discuss the testimony of five agents as it related to the three defendants. (Add'l A. 2). The Court denied this request and granted the government a total of forty five minutes.

Requests by one counsel for defendants was for thirty minutes and by counsel for Cozzo was for forty-five minutes for final argument and the need for this time was pointed out to the Court. Nevertheless, the argument of each defense counsel was, over objection, limited to twenty minutes. (Add'l A. 4)

It was impossible to argue this case adequately in twenty minutes, and the reasons for more time were urged by defense counsel and were apparent to the Court.

In *Rossi* v. *United States*, 9 F. 2d 362, 368 (C.A. 8), the Court said:

> "The constitutional right of a defendant to be heard by counsel cannot be taken away by a court. The court has a right to limit within proper bounds the time of argument, in order to prevent abuse thereof; but it cannot place such a limit as to prevent a full and fair presentation of defendant's case to the jury by his counsel. The right to counsel is at least partially destroyed, if sufficient time is not allowed to fully and fairly present the facts.
>
> * * *
>
> "Alleged abuse of discretion in the limitation of arguments to the jury in criminal cases has received frequent consideration by the courts. In *York* v. *United States* (C.C.A.) 299 F. 778, where a trial occupied parts of two days, and the result depended largely on a question of veracity between defendant and a witness who claimed to have been an accomplice, the limitation of argument of defendant's counsel to 20 minutes was held to be an abuse of discretion. In *Kolp* v. *United States* (C.C.A.) 2 F. (2d) 953, a limitation of 10 minutes for argument over objection was held unreasonable. Other cases where the time fixed by the court for argument was held to be unreasonable are *White* v. *People*, 90 Ill. 117, 32 Am. Rep. 12 (9 witnesses, limitation 5 minutes); *McLean* v. *State*, 32 Tex. Cr. R. 521, 24 S.W. 898 (many witnesses, limitation 17 minutes); *Jones* v. *Commonwealth*, 87 Va. 63, 12 S.E. 226 (17 witnesses, limitation thirty minutes); *Walker* v. *State*, 32 Tex. Cr. R. 175, 22 S.W. 685 (12 witnesses, limitation 45 minutes); *Huntley* v. *State* (Tex. Cr. App.) 34 S.W. 923 (11 witnesses, limitation 15 minutes); *People* v. *McMullen*, 300 Ill. 383, 133 N.E. 328 (limitation 35 minutes); *People* v. *Green*, 99 Cal. 564, 34 P. 231 (24 witnesses, limitation one hour); *State* v. *Rogoway*, 45 Or. 601, 78 P. 987, 81 P. 234 (22 witnesses, limitation one hour). On the general subject, see, also, 12 Cyc. 568; 38 Cyc. p. 473.

"We are forced to the conclusion from a careful examination of this record that the limitation of argument to the jury of 15 minutes was an unreasonable limitation and constituted prejudicial error."

CONCLUSION.

For the foregoing reasons, the petitioners respectfully request that this Court grant and issue its Writ of Certiorari for review of the decision below.

Respectfully submitted,

GEORGE F. CALLAGHAN,
Attorney for Joseph Spatuzza,
Petitioner.

MAURICE J. WALSH,
Attorney for James Cozzo,
Petitioner.